IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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No. 75-1583

FRANCES MORRIS, ET AL., APPELLANTS,

versus

L. MARION GRESSETTE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Three-Judge Court)

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16 (1) (d) of the Rules of the Supreme Court of the United States, appellees move to affirm the final judgment and decree of the District Court on the ground that the State of South Carolina, having made a proper submission of its 1972 Senate reapportionment plan to the United States Attorney General and having received no objection to the plan within sixty days after submission, is authorized under Section 5 of the Voting Rights Act of 1965 to enforce the plan.

QUESTION PRESENTED

Whether, in view of the Attorney General's failure to object to the 1972 South Carolina Senate reapportionment plan within sixty days after it was properly submitted to him, the State of South Carolina may continue to enforce the plan under Section 5 of the Voting Rights Act of 1965?

STATEMENT OF THE CASE

This is a suit to enjoin enforcement of the 1972 Senate reapportionment plan (hereinafter the "Senate Plan"), enacted by the General Assembly of South Carolina in Act 1205 of 1972,[1] on the ground that it has not been precleared under Section 5 of the Voting Rights Act of 1965.[2] The appellants assert that the Senate Plan has not been precleared, while the appellees claim that it has. This difference arises because the Attorney General initially entered a "no-objection" letter to the Plan within the sixty-day period provided by Section 5, but more than a year later

[1] 57 STAT. 2384 (1972). Section 2 of Act 1205 contained two Senate reapportionment plans, Plan A and Plan B. Plan B was to take effect only if Plan A was declared invalid by the courts. It is Plan A that is the subject of this litigation. Section 3 of Act 1205 related to numbered seats in the House of Representatives. The Attorney General objected to Section 3 and it was never enforced.

[2] 42 U. S. C. § 1973c. The statute provides in pertinent part:

> Whenever a State . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State . . . may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, . . . and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure, has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. . . . Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

interposed an objection as a result of a court order stating that an objection to the Plan was required.[3]

Harper I

The instant case is the latest in a series of three lawsuits brought by the same class of plaintiffs seeking to overturn the reapportionment of the South Carolina Senate. The first suit, which will be referred to as *Harper I* in this motion,[4] was brought in 1971 challenging the reapportionment of the South Carolina Senate under Act 932 of 1971[5] (hereinafter the "1971 Plan") following the 1970 census. The *Harper I* plaintiffs claimed, *inter alia*, that the 1971 Plan abridged their right to vote on account of their race and color, because it was based on multimember election districts. On April 7, 1972, the District Court in *Harper I* struck down the 1971 Plan, finding that it violated the Fourteenth Amendment one man, one vote principle. In its order the *Harper I* Court expressly rejected the racial discrimination claims of the plaintiffs, claims that had been the subject of an extensive evidentiary record and full briefing and argument by counsel.[6] The District Court retained jurisdiction, but declined to draw a constitutional reapportionment plan itself unless

[3] *Harper v. Kleindienst*, 362 F. Supp. 742 (D. D. C. 1973), affirmed *sub nom. Harper v. Levi*, 520 F. 2d 53 (D. C. Cir. 1975).

[4] *McCollum v. West*, Civil Action No. 71-1211 (D. S. C. filed Dec. 7, 1971) (unreported). One of the named plaintiffs in *McCollum* was John Roy Harper II. *McCollum* was consolidated with several other cases challenging the 1971 Plan, all of which are sometimes referred to under the style of *Twiggs v. West*. This usage is misleading, since *Twiggs* was a Fourteenth Amendment suit presenting no question of minority voting rights *per se*. In this motion the Fourteenth Amendment suit will be called *Twiggs* and the Fifteenth Amendment suit called *Harper I*.

[5] 57 STAT. 2071 (1971).

[6] During the pendency of the *Harper I* case, the 1971 Plan was being reviewed by the Attorney General pursuant to a submission by the State under Section 5 of the Voting Rights Act. On March 6, 1972, the Attorney General interposed an objection to implementation of the 1971 Plan, stating that he was "unable to conclude" that the Plan did not abridge voting rights on account of race or color. Letter of March 6, 1972, from David L. Norman to Daniel R. McLeod.

the State legislature failed to do so within thirty days. On May 6, 1972, a new Senate reapportionment statute,[7] containing the Senate Plan now at issue, was signed into law by the Governor of South Carolina. This new plan was filed with the District Court for review under its retained jurisdiction to see if it satisfied the constitutional guidelines established in the Court's April 7th order. On May 23, 1972, the District Court entered an order approving the Senate Plan. A further order of June 9, 1972, rejected the claim of the *Harper I* plaintiffs that the Plan was racially discriminatory. From these decisions two appeals were noticed to this Court. One, *Powell v. West,* challenged the District Court's approval of the Senate Plan as an "advisory opinion," since the Court had not requested the parties in *Twiggs* to present their views on it. This Court affirmed the District Court's order in the *Powell* appeal.[8] The second appeal, noticed by the *Harper I* plaintiffs, was based on Fifteenth Amendment grounds. This appeal was not perfected,[9] as will be more fully discussed below.

Section 5 Submission of the Senate Plan

Three days after the Senate Plan was signed into law, it was submitted to the Attorney General for review and preclearance under Section 5 of the Voting Rights Act. The submission was received by the Attorney General on May 12, 1972, and was considered by him to be complete under his own guidelines[10] as of that date. The sixtieth calendar day after May 12, 1972, was July 11, 1972. On June 30, 1972, the Attorney General responded to the submission of the Senate Plan in a letter addressed to Daniel R. McLeod, the South Carolina Attorney General. In the

[7] Act 1205 of 1972, 57 STAT. 2384.
[8] *Powell v. West,* 413 U. S. 901 (1973) (memorandum opinion).
[9] See Stipulations, Par. 7, Appendix B, *infra,* at 12a.
[10] 28 C. F. R., § 51 *et seq.*

letter the Attorney General stated that he interposed no objection to the Senate Plan.[11] It is conceded that, other than this letter of June 30th, the Attorney General conveyed no decision to the State of South Carolina either objecting or not objecting to the Senate Plan on or before July 11, 1972.[12]

Harper II

On August 10, 1972, thirty days after the sixty day period for objecting to the Senate Plan had expired, two of the named plaintiffs in *Harper I,* John Roy Harper II and Victoria DeLee, commenced an action in the District of Columbia challenging the Attorney General's failure to object to the Senate Plan. This suit,[13] which will be referred to as *Harper II* in this motion, rested on a claim that the Attorney General had erroneously taken into consideration the decision in *Harper I* in reaching his own decision not to object to the Senate Plan. *Harper II* was brought on behalf of the same class of plaintiffs as *Harper I.* It is noteworthy that the period in which the *Harper I* plaintiffs could perfect their appeal had not yet expired, and would not expire for over three months, at the time *Harper II* was commenced.[14] The plaintiffs chose to bring the *Harper II* action and chose not to press their *Harper I* claim that the Senate Plan was racially discriminatory on appeal to this Court.

On August 11, 1972, the single-judge District Court in *Harper II* entered an interlocutory order purporting to extend the time during which the Attorney General might interpose an objection to the Senate Plan. This order was based on a finding of "fact" that the time in which the

[11] See Appendix C, *infra,* at 14a.
[12] See Stipulations, Par. 1, Appendix B, *infra,* at 11a.
[13] *Harper v. Kleindienst,* 362 F. Supp. 742 (D. D. C. 1973). For "historical" reasons the case has been variously styled *Harper v. Kleindienst, Harper v. Richardson, Harper v. Bork, Harper v. Saxbe,* and *Harper v. Levi.*
[14] See Stipulations, Par. 7, Appendix B, *infra,* at 12a.

Attorney General might interpose objection to the Senate Plan under Section 5 had not expired.[15] Some nine months later, on May 16, 1973, the District Court entered an order finding that the Attorney General's refusal to object to the Senate Plan was clearly erroneous. Seemingly adopting the plaintiffs' contention that the Attorney General "made no findings at all" in deciding not to object to the Senate Plan, the District Court ordered the Attorney General to make a "reasoned decision in accordance with his statutory duty."[16] On July 19, 1973, the District Court entered a second order stating that Section 5 of the Voting Rights Act required the Attorney General to object to the Senate Plan. Pursuant to the District Court's order, the Attorney General objected to the Senate Plan on July 20, 1973, over one year after the expiration of the sixty-day period.

The District Court's order in *Harper II* was affirmed by a three-judge panel of the Court of Appeals, one judge dissenting, on July 24, 1975.[17] That review became final on October 22, 1975, when the time for filing a petition for a writ of *certiorari* in this Court expired.

Enforcement of the Senate Plan

It is important to emphasize that South Carolina has scrupulously adhered to the requirements of Section 5 with respect to the Senate Plan. The Plan was submitted to the Attorney General promptly after it was enacted into law. Although the *Harper I* court approved the Plan as satisfying the requirements of the Fifteenth Amendment, the State did not enforce it until the Attorney General had

[15] See Appendix E, *infra*, at 19a. The District Court also directed notice of the proceedings to be given to the State of South Carolina. The State of South Carolina received notice of the *Harper II* proceedings on or about August 14, 1972. See Stipulations Par. 11, Appendix B, *infra*, at —.

[16] 362 F. Supp. at 746.

[17] *Harper v. Levi*, 520 F. 2d 53 (D. C. Cir. 1975).

entered no objection on June 30, 1972.[18] At that time the 1972 primary elections were imminent and so the State took immediate steps to implement the Plan in order to allow sufficient time to prepare for a fair and orderly election process. The 1972 primary and general elections were held under the Plan. No member of the appellants' class sought to enjoin enforcement of the Plan on the ground that the Attorney General's non-objection was invalid, either prior to or within a reasonable time after the 1972 elections.[19]

Appellants intimate that South Carolina has deliberately "ignored" the law or somehow acted in bad faith by continuing to enforce the Senate Plan.[20] Both the *Harper II* court[21] and the District Court below[22] stated that it was not necessary for South Carolina to intervene in the *Harper II* litigation. It is true that South Carolina is taking steps to conduct the 1976 Senate elections under the Senate Plan. It is also true that the *Harper I* court found that the Plan was *not* racially discriminatory, that the Attorney General did not interpose objection to the Plan within the sixty days prescribed by the Voting Rights Act, and that the District Court in this case held that South Carolina may continue to enforce the Plan under the Voting Rights Act.

The Proceedings Below

The appellants filed this suit on November 7, 1975, alleging in their complaint that South Carolina had not obtained authority to enforce the Senate Plan under Section 5. It was conceded by all parties at the outset that the racial discrimination issues litigated in *Harper I* were not presented in this case and were not being relitigated.

[18] See Stipulations, Pars. 1 and 2, Appendix B, *infra*, at 11a.

[19] See Stipulations, Par. 5, Appendix B, *infra*, at 11a.

[20] Jurisdictional Statement, at 9-10.

[21] 362 F. Supp. at 744.

[22] See Jurisdictional Statement, at 9a-12a.

It was also conceded by all parties that the Senate Plan is legislation covered by the Voting Rights Act and that compliance with the preclearance provisions of Section 5 of the Act is a prerequisite to implementation of the Plan by South Carolina. The appellants presented three main arguments below: (1) they claimed that the State of South Carolina was bound by the *Harper II* decision and, therefore, could not present a defense on the merits; (2) they claimed that the *Harper II* decision was correct in holding that the Attorney General's non-objection was reviewable under the Administrative Procedure Act; and (3) they claimed that the Attorney General was legally erroneous in considering the *Harper I* decision as a basis for his non-objection. The appellees argued in reply that: (1) the State was not estopped by *Harper II* from contesting on the merits; (2) that the Attorney General's failure to object within sixty days authorized South Carolina to enforce the Senate Plan; (3) that the Attorney General's non-objection was not reviewable under the APA; (4) that the Attorney General's subsequent objection to the Senate Plan was additionally invalid because it was interposed by order of a court acting without jurisdiction; and (5) that the Attorney General's decision to defer to the *Harper I* decision was legally proper and within his discretion under Section 5.

The United States filed an *amicus curiae* memorandum, in which it declined the invitation of the District Court to participate in the case on the ground that it was "unable at this time to fully address the issues in this case."[23] Attorneys from the Justice Department also appeared at the hearing before the three-judge court, but declined to participate in oral argument.

On March 12, 1976, the District Court filed its opinion and order. On the question of collateral estoppel, it held

[23] Amicus Memorandum of the United States, at 4.

that South Carolina was not precluded by *Harper II* from defending the suit on the merits. On the merits, the District Court held that the Attorney General's failure to object within the sixty day period was not reviewable under the APA because

> the action of the Attorney General under § 5 . . . is (1) not adjudicatory, and (2) any party with standing who was dissatisfied with his action had an "adequate remedy in a court," and (3) there were not simply "persuasive" but compelling reasons to believe nonreviewability of that action was "the purpose of Congress."[24]

The court, therefore, concluded that

> the determination made by the Attorney General is not reviewable and, when he failed within sixty (60) days after submission to interpose an objection to the South Carolina Senate reapportionment as provided in Act 1205, the State of South Carolina was automatically authorized to enforce it; subject to the right of any proper party or parties to assail the constitutional validity of that legislation in an appropriate action.[25]

In view of this holding, the District Court did not reach or decide the remaining issues raised by the parties.[26]

Appellants' subsequent motions to alter or amend the judgment and for an injunction pending this appeal were denied by the District Court on March 30, 1976. Appellants filed notice of appeal to this Court on April 16, 1976.

[24] Jurisdictional Statement, at 14a.
[25] Jurisdictional Statement, at 25a.
[26] Appellants' assertions that the court below did not "dispute" the authority of the *Harper II* district court (Jurisdictional Statement, at 11, 14) should be understood in this context. The court below neither denied nor affirmed; it simply did not reach the question.

GROUNDS FOR GRANTING THE MOTION TO AFFIRM

I

The District Court was manifestly correct in holding that, because the Attorney General failed within 60 days after submission to interpose objection to the South Carolina Senate reapportionment plan, the State of South Carolina is authorized to enforce the plan.

Section 5 of the Voting Rights Act provides that a voting change "may be enforced" by the State if it

> . . . has been submitted by the chief legal officer . . . of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . .[27]

It is undisputed that the Senate Plan was submitted by the State of South Carolina for review and preclearance under Section 5. The testimony of Gerald W. Jones, Chief of the Voting Rights Section of the Justice Department, shows that the submission was complete and the sixty-day period began to run on May 12, 1972:

> [Q.] In administering Section 5 under your regulations, is it correct that the department must at some point in considering a submission determine that the 60-day period has begun to run?
>
> A. That is correct.
>
> Q. Is it the policy of the department under existing procedures to treat that period as having begun to run when the submission is complete; that is, when the department has received the information which it considers necessary to consider that submission from the submitting authority?
>
> A. That is correct.

[27] 42 U. S. C., § 1973c.

> Q. Now, with respect to Act 1205, was the date which the department determined the 60-day period had begun to run May 12 of 1972?
>
> A. As I indicated before, we took the position in the District Court in this litigation in the Harper litigation that the submission of Act 1205 was complete on the date we initially received it.[28]

The sixtieth day after May 12, 1972, was July 11, 1972, and it is conceded that the Attorney General did not interpose an objection to the Senate Plan on or before that latter date.[29] The only response to the submission of the Senate Plan before July 11, 1972, was the Attorney General's letter of June 30, 1972, in which he stated, "we enter no objection to the implementation of Plan A of Act 1205."[30]

These were the undisputed facts before the District Court upon which it concluded that South Carolina had complied with Section 5 and was, therefore, entitled to enforce the Senate Plan. The correctness of the District Court's conclusion is obvious from the face of the statute. As was stated by Mr. Justice Blackmun in *State Board of Election Commissioners v. Evers:*[31]

> . . . Section 5, it seems to me, plainly and clearly provides that if the procedure has been properly submitted to the Attorney General, as it was, "and the Attorney General has not interposed an objection within sixty days after such submission," as he did not, the proposed statutory changes "may be enforced" without the court proceeding in the District of Columbia and without resubmission to the Attorney General. Here the proposal was properly submitted to the Attorney General and he took no action by way of interposing an objection within the allowed 60 days. I do not see how the statute can be read or construed in

[28] Deposition of Gerald W. Jones, at 38, ff. 1-18.
[29] Stipulations, Par. 1, Appendix B, *infra*, at 11a.
[30] Appendix C, *infra*, at 14a.
[31] 405 U. S. 1001, 1003-4 (1972) (concurring opinion).

any way other than to the effect that the conditions of its proviso were fulfilled and that the proposed new legislation was therefore enforceable subject, of course, to the statute's recognized exception as to any contest on the merits. I see nothing in *Perkins v. Matthews*, 400 U. S. 379, 385, 27 L. Ed. (2d) 476, 483, 91 S. Ct. 431 (1971), which supports a contrary conclusion.

II

The District Court was manifestly correct in holding that a determination made by the Attorney General under Section 5 of the Voting Rights Act is not reviewable under the Administrative Procedure Act.

Speaking to the preclearance requirement of the Voting Rights Act in *Allen v. State Board of Elections*,[32] this Court stated:

> Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; *there is no further remedy provided by § 5.*

The District Court's decision that review of Section 5 determinations is not available to private parties under the Administrative Procedure Act merely gives effect to the *Allen* rule in this case, making summary affirmance by this Court appropriate.

Under the express terms of the Administrative Procedure Act, agency action is not reviewable in three situations:

(1) where agency action is committed to agency discretion by law;[33]

(2) where there is other adequate remedy in the courts;[34] and

[32] 393 U. S. 544, at 549-50 (emphasis added).
[33] 5 U. S. C., § 701 (a) (2).
[34] 5 U. S. C., § 704.

(3) where the statute authorizing agency action precludes judicial review.[35]

Prior decisions of this Court suggest that each of these exceptions applies to decisions of the Attorney General under Section 5 of the Voting Rights Act.

Committed to Agency Discretion. In *Georgia v. United States*,[36] this Court emphasized that the implementation of Section 5 is largely a matter for the Attorney General's discretion. In part II of the *Georgia* opinion, the Court noted that Section 5 is "silent as to the procedures the Attorney General is to employ in deciding whether or not to object to state submissions, as to the standard governing the contents of those submissions, and as to the meaning of the 60-day time period in which the Attorney General is to object, if at all."[37] The Court also recognized that the legal standards of review which the Attorney General was to apply were not specified in the Act and was, therefore, a matter committed to his discretion: "It is not necessary to hold that this allocation of the burden of proof by the Attorney General was his only possible choice under the Act, in order to find it a reasonable means of administering his § 5 obligation."[38] The clear thrust of this analysis is that the administration of Section 5 is a matter committed by Congress to the Attorney General's discretion.

Another telling indication that the Attorney General's preclearance decisions are committed to agency discretion is to be found in the language of Section 5 itself, which speaks in terms of the Attorney General's "failure to object" as allowing the State to enforce a submitted voting change. The 1975 amendments to Section 5 make it even clearer that it is within the Attorney General's discretion

[35] 5 U. S. C., § 701 (a) (1).
[36] 411 U. S. 526 (1973).
[37] *Id.* at 536.
[38] *Id.* at 538.

to make no decision on a submitted change by speaking both of "an affirmative indication . . . that no objection will be made" *and* "the Attorney General's failure to object." [39] As Judge MacKinnon observed in *Harper II:*

> Surely no one would contend that if the Attorney General took no action whatsoever, as is clearly authorized by the statute, that inaction could be subject to judicial review under the APA. It is hard to imagine a clearer instance of a matter "committed to agency discretion by law." [40]

Other Adequate Remedy in the Courts. Section 5 of the Voting Rights Act explicitly provides that

> Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object . . . shall bar a subsequent action to enjoin the enforcement of such qualification, prerequisite, standard, practice, or procedure.[41]

Thereby Congress was careful to assure the right of private parties to seek a judicial determination of the validity of a voting change if they disagreed with the Attorney General's preclearance decision. This Court recognized as much in the *Allen* case when it expressly mentioned the right of private litigants to bring traditional injunctive suits although the State had obtained Section 5 preclearance of its voting change.[42] Since other judicial remedies are available in the courts, review under the Administrative Procedure Act is unavailable and unnecessary to protect private parties' rights.[43]

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[39] 42 U. S. C., § 1973c (1975).
[40] 520 F. 2d at 73 (dissenting opinion). Cf. *United Jewish Organization of Williamsburgh v. Wilson*, 510 F. 2d 512, 520, n. 16 (2d Cir. 1975).
[41] 42 U. S. C., § 1973c.
[42] See *Allen v. State Board of Elections*, *supra*, at 549-50.
[43] See *Warner v. Cox*, 487 F. 2d 1301 (5th Cir. 1974); *State of Minnesota v. Weinberger*, 359 F. Supp. 789 (D. Minn. 1973); *Vogel v. Gottschalk*, 350 F. Supp. 865 (E. D. Va. 1972).

Preclusion. Following the rule enunciated by this Court in *Abbot Laboratories v. Gardner,*[44] the District Court found that "there were not simply 'persuasive' but compelling reasons to believe non-reviewability of [the Attorney General's] action was 'the purpose of Congress'" [45] under Section 5. Again, previous decisions of this Court confirm the correctness of the District Court's view.

In the *Allen* case, this Court recognized that the congressional purpose in providing for submission of voting changes to the Attorney General was to give the covered State "a rapid method of rendering a new state election law enforceable." [46] The legislative history of Section 5 also makes it quite clear that Congress intended to provide an expeditious method by which a State could obtain authority to enforce a voting change without the delays and burdens of litigation in court.[47] To permit judicial review under these circumstances would be to impose on the State the very burden of litigation and delay that Congress intended to avoid. The District Court stated this point quite clearly in its opinion:

> The delays that would follow, if judicial review of the Attorney General's determination were found to exist, are well illustrated by the record in *Harper,* which involved no real factual review but concerned only an issue of law. The action was begun in the District Court in August, 1972, but the District Court, though the parties submitted the case on an agreed statement of facts, did not decide it until the middle of May, 1973, almost ten months later. The appeal from that decision was not heard until September, 1974, and the opinion of the Court of Appeals was not filed until the end of July, 1975. In other words, the right of the

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[44] 387 U. S. 136 (1967).
[45] Jurisdictional Statement, at 14a.
[46] 393 U. S. at 549.
[47] See H. R. Rep. No. 439, 89th Cong., 1st Sess., at 38 (1965); *Hearings on S. 1564 Before the Senate Committee on the Judiciary,* 89th Cong., 1st Sess., pt. 1, at 69-73, 237 (1965).

State to enforce its legislation, if § 5 is to be construed as plaintiffs contend and as *Harper* held, would have been delayed from May 2, 1972 to the end of July, 1975, a period of over three years. It was this very delay, so graphically demonstrated by the record in this case which Congress, by providing for Attorney General clearance, sought to avoid.[48]

Given the large measure of discretion invested in the Attorney General by Section 5, the express congressional provision of an "other adequate remedy in a court" in the statute, and the purpose of Congress to avoid the delay of judicial proceedings in obtaining preclearance, it may be said that the purpose to preclude judicial review "is fairly discernible in the statutory scheme." *Data Processing Service v. Camp,* 397 U. S. 150, 157 (1970). To allow judicial review under the Administrative Procedure Act would be to defeat that discernible purpose.

III

The arguments (a) that the Senate Plan is "plainly discriminatory" and (b) that the Senate Plan is a "court-ordered" plan were not raised by the pleadings, were not briefed or argued below, and were not decided by the District Court in its opinion on the merits. These assertions are clearly insubstantial and are improperly raised by appellants in the Jurisdictional Statement.

In the Jurisdictional Statement appellants have interjected two questions which are not at issue in this appeal. The first is raised by their assertion that the Senate Plan is "plainly discriminatory;" the second by their argument, admittedly inconsistent with their own position, that the Senate Plan is a "court-ordered" plan.

[48] Jurisdictional Statement, at 22a, n. 28.

The Racial Discrimination Argument. A key ingredient in appellants' statement of the case and argument[49] is the repeated assertion that the Senate Plan is racially discriminatory. This *assertion* is no doubt designed to give appellants' position an emotive appeal that it would otherwise lack; but in the context of this case it is nothing more than that—a bald, insubstantial assertion.

The Senate Plan was challenged by appellants and their class in *Harper I* on the ground, *inter alia,* that its use of multimember districts is racially discriminatory. The parties engaged in discovery on that issue and a full evidentiary record was presented to the *Harper I* Court in an attempt to prove the allegations that black voting strength is diluted by the Plan. Racial discrimination was fully briefed and argued by the parties. After thorough scrutiny of the Plan against this background of litigation, the *Harper I* court found that it was not racially discriminatory. Appellants and their class chose not to appeal that finding to this Court.

All parties to this case have conceded from the beginning that the questions litigated in *Harper I* are not presented in this case and are not being relitigated. On this understanding, appellees did not pursue discovery on the question of racial discrimination and no evidence was entered into the record to show that the Plan is or is not discriminatory. The question of racial discrimination was not briefed in the court below nor was it argued there. Nothing in the opinion of the District Court addresses the question.

It is clear from the decisions of this Court that dilution of minority voting strength will not be presumed, it must be proved by evidence.[50] The presumption in favor

[49] See Jurisdictional Statement, 4-5, 11-12.

[50] *Whitcomb v. Chavis,* 403 U. S. 124, 143-44 (1971); *White v. Regester,* 412 U. S. 755, 765-66 (1973); *Champion v. Meier,* 420 U. S. 1, 17 (1975).

of the non-discriminatory character of the Senate Plan is strengthened by the *Harper I* decision on that precise question. *Harper I* has never been challenged by appellants or the members of their class and the questions raised therein are conceded by them to be not presented in this case. It follows that appellants' naked statements that the Senate Plan is plainly discriminatory are improper and as such ought to be ignored by this Court.

The Court-Ordered Plan Argument. The State of South Carolina did not below, and does not now, contend that the Senate Plan is a "court-ordered" plan within the meaning of *East Carroll Parish School Board v. Marshall.*[51] The District Court clearly understood the position of the parties when it said

> It is conceded by all parties that the challenged legislation is within the coverage of the Voting Rights Act of 1965 and that compliance with § 5 of that Act was a condition to the enforcement of such legislation.[52]

The question was first raised after the decision on the merits by the appellants in their Rule 59 motion to alter or amend judgment, filed with the District Court on March 22, 1976. The District Court obviously considered the point to be insubstantial, since it denied the motion without opinion.[53] How a question on which the appellants, the appellees, and the court below are in agreement can be the basis for an appeal to this Court is beyond the comprehension of the appellees, although we admit that it is

[51] —— U. S. ——, 96 S. Ct. 1083 (1976).

[52] Jurisdictional Statement, at 2a.

[53] Any argument based on *East Carroll Parish* is plainly insubstantial on the facts of this case. In *East Carroll Parish* the District Court acting under its retained jurisdiction, instructed a Louisiana police jury and school board to file reapportionment plans with the court after the 1970 census. This action was necessary because neither the police jury nor the school board had authority to reapportion itself under Louisiana law. Reapportionment plans were filed and the District Court entered an order adopting them. Thus the plans were implemented solely on the authority of the court order. By contrast, the Senate Plan in this case was enacted by the General Assembly of South Carolina acting with full legislative authority under the State Constitution. The Plan became law upon signature by the Governor on May 6, 1972, although it was not enforced until June 30, 1972, when the Attorney General stated that he had no objection to its implementation. This Court itself noted that had the plan in *East Carroll Parish* been enacted on the authority of the police jury, it would not have been a court-ordered plan and "clearance under § 5 of the Voting Rights Act would clearly have been required." *East Carroll Parish School Board v. Marshall,* —— U. S. ——, 96 S. Ct. 1083, at 1085, n. 6 (1976).

not the first time that appellants' theories of adjudication have puzzled us in this case.

CONCLUSION

For all the reasons stated above, this Court should affirm the judgment below without a hearing.

Respectfully submitted,

DANIEL R. McLEOD,
Attorney General,

TREVA G. ASHWORTH,
Assistant Attorney General,
Post Office Box 11549,
Columbia, S. C. 29211,

RANDALL T. BELL,
University of South Carolina,
School of Law,
Columbia, S. C. 29208,

JAMES P. FIELDS,
Senate Judiciary Committee,
Columbia, S. C. 29211,

Attorneys for Appellees.

May 28, 1976.

APPENDICES

APPENDIX A

PLEADINGS BELOW

Civil Action No. 75-1998

COMPLAINT

1. This is a complaint pursuant to section 5 of the Voting Rights Act, 42 U. S. C. § 1973c, for declaratory and injunctive relief against the enforcement of Act 1205, Acts of the South Carolina General Assembly of 1972.

2. Jurisdiction arises under 28 U. S. C. §§ 1331 and 1343, and 42 U. S. C. § 1973c. The matter in controversy, exclusive of interest and costs, exceeds the value of $10,000.00.

3. Plaintiffs Frances Morris and Maxine Woods are citizens of the United States and residents and qualified electors of Charleston County, South Carolina. Each is Black.

4. Each plaintiff sues in her own behalf, and, pursuant to Rule 23(b)(2), Fed. Rules Civ. Proc., on behalf of all others similarly situated. The class includes all qualified electors of South Carolina, particularly all Black qualified electors. The class is so numerous that joinder of all members is impracticable. The questions of law and fact are common to the class. Plaintiffs' claims are typical of the claims of the class, and plaintiffs will fairly and adequately represent the interests of the class. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

5. Defendant Gressette is a member of the South Carolina Senate and is President Pro Tem of that legislative body; Defendant Edwards is the Governor of the State of South Carolina and in his capacity as Governor of the State of South Carolina is charged with the execution and enforcement of the Constitution and Laws of the State of South Carolina, including all laws pertaining to elections; Defendant Harvey is the Lieutenant Governor of the State

of South Carolina and President of the South Carolina Senate and, as such, is the presiding officer of that legislative body; Defendant Thomas is the Clerk of the South Carolina Senate and is charged with the preparation of calendars, journals and other records of the Senate which list matters of pending business and reflect action taken on all legislative items before that body; Defendants Callison, Townsend, Chapman, Morris and Gray are members of and constitute the South Carolina State Election Commission and, as such, are charged with general administration of elections for State Senate and other state offices; Defendant Ellisor is Executive Director of the South Carolina Election Commission and as such is responsible for the actual administration of the responsibilities vested in the South Carolina Election Commission; Defendant McLeod is Attorney General of the State of South Carolina and chief law officer of the State of South Carolina, and is responsible under 42 U. S. C. § 1973c for seeking and obtaining authority to enforce voting changes (such as Act 1205) which are covered by that section; Defendant Thornton is Secretary of State of South Carolina, is custodian of the Acts of the General Assembly and is also responsible for preparing, signing, recording and issuing commissions of office including those for the office of State Senate.

6. Defendant Gressette is sued in his own behalf and, pursuant to Rule 23(b)(2), Fed. R. Civ. P., on behalf of the class of all members of the South Carolina Senate. The class is so numerous that joinder of all members is impracticable. The questions of law and fact are common to the members of the class. Defendants' claims are typical of the claims of the class, and defendants will fairly and adequately represent the interests of the class. Plaintiffs have acted on grounds generally applicable to the defendant class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

7. Each defendant and member of the defendant class is sued in his individual and official capacities.

8. Each defendant and member of the defendant class has, at all times relevant herein, acted and threatened to act under color of law.

9. The State of South Carolina is a covered jurisdiction pursuant to 42 U. S. C. §§ 1973b and 1973c. 30 Fed. Reg. 9897 (August 7, 1965).

10. On May 6, 1972, the State of South Carolina adopted Act 1205, Acts of the General Assembly of 1972, reapportioning the South Carolina Senate.

11. Act 1205 constitutes a "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964."

12. The State of South Carolina has not gained authority to enforce Act 1205 in the manner required by 42 U. S. C. § 1973c. *Harper v. Levi*, 520 F. 2d 53 (D. C. Cir. 1975).

13. South Carolina's failure to gain authority pursuant to 42 U. S. C. § 1973c for enforcement of Act 1205 renders that act ineffective as law and unenforceable.

14. Notwithstanding the unenforceability of Act 1205, the defendants intend to enforce that Act at statewide elections to be held in 1976, and to conduct elections for, and authorize the seating of, members of the South Carolina Senate according to the provisions of Act 1205.

15. On information and belief, members of the defendant class have decided and announced that they will enforce Act 1205 and will not comply with 42 U. S. C. § 1973c unless ordered by this Court.

16. The enforcement of Act 1205 will violate the rights of plaintiffs and members of their class as guaranteed by the Voting Rights Act, 42 U. S. C. § 1973 *et seq.*

17. Plaintiffs have no adequate remedy at law for this violation of their rights. Unless this Court enjoins enforcement of Act 1205, plaintiffs will suffer irreparable injury to their precious right to vote.

WHEREFORE, plaintiffs pray that this Court grant the following relief:

a. Order that a three-judge court be convened, pursuant to 42 U. S. C. § 1973c.

b. Certify the plaintiff and defendant classes pursuant to Rule 23(b)(2), Fed. R. Civ. P.

c. Grant a permanent injunction against the enforcement of Act 1205.

d. Enjoin the conduct of any elections or preparation for elections for the South Carolina Senate pursuant to Act 1205 or any other reapportionment plan which has not been lawfully cleared pursuant to 42 U. S. C. § 1973c.

e. Declare that this Court will itself devise an interim plan for the conduct of the 1976 elections and for the seating of Senators for terms of such length as may be deemed equitable, if (1) by January 31, 1976, the appropriate defendants have not submitted a new reapportionment plan for clearance pursuant to 42 U. S. C. § 1973c, or if (2) by March 31, 1976, clearance pursuant to 42 U. S. C. § 1973c has not been obtained for a new reapportionment plan.

f. Award the plaintiffs their costs of suit and reasonable attorneys' fees.

g. Grant such other and further relief as may be appropriate.

EPSTEIN, McCLAIN & DERFNER,
P. O. Box 608,
Charleston, S. C. 29402,
(803) 577-3170
Attorneys for Plaintiffs.
By: /s/ ARMAND DERFNER

PAUL R. DIMOND
Lawyers Committee for Civil Rights Under Law
520 Woodward Building
Washington, D. C. 20005

TRUE COPY
Test:
MILLER C. FOSTER, JR., Clerk
/s/ CHARLOTTE LIENLOPHER
By: Deputy Clerk

Charleston, S. C.
November 6, 1975

Civil Action No. 75-1998

ANSWER

Come now the Defendants in the above-styled action and in answer to the Complaint herein do say and allege:

In Answer to the Complaint and as a First Defense

1. Defendants admit the allegations of Paragraph 1 of the Complaint insofar as those allegations merely state the purpose of Plaintiffs in instituting this action.

2. Defendants admit only so much of Paragraph 2 of the Complaint as alleges that jurisdiction arises under 28 U. S. C. § 1343 and 42 U. S. C. § 1973c. Defendants deny the remaining allegations of Paragraph 2. Defendants further allege that this action is proper for determination by a three judge court as required by 28 U. S. C. § 2281 and 42 U. S. C. § 1973c and that declaratory judgment is appropriate under 28 U. S. C. § 2201.

3. Defendants, being without sufficient knowledge or information as to the allegations of Paragraph 3 of the Complaint, deny the same.

4. Defendants deny the allegations of Paragraph 4 of the Complaint.

5. Defendants admit the allegations of Paragraph 5 of the Complaint except that statement alleging the defendant Morris to be a member of the South Carolina State Election Commission as the defendant Morris is no longer a member of the Commission and has been replaced by Raymond A. Harris.

6. Defendants admit the allegations of Paragraph 6 of the Complaint.

7. Defendants admit only so much of Paragraph 7 of the Complaint as alleges that each defendant and member of the defendant class is sued in his official capacity.

8. Defendants admit only so much of Paragraph 8 of the Complaint as alleges that each defendant and member of the defendant class has, at all time relevant herein, acted under color of state law. Defendants deny the remaining allegations of Paragraph 8.

9. Defendants admit the allegations of Paragraphs 9, 10 and 11 of the Complaint.

10. Defendants deny the allegations of Paragraphs 12 and 13 of the Complaint. Defendants further allege in answer to Paragraphs 12 and 13 of the Complaint that by letter of June 30, 1972, from David L. Norman, Assistant Attorney General, Civil Rights Division, to Honorable Daniel R. McLeod, Attorney General, State of South Carolina, the United States Attorney General stated: ". . . we enter no objection to the implementation of Plan A of Act 1205." This decision to enter no objection to Plan A of Act 1205 was lawful, valid, and within the scope of the authority vested in the United States Attorney General by 42 U. S. C. § 1973c and constitutes authority under which the State of South Carolina and the Defendants may enforce Plan A of Act 1205 of 1972.

11. Defendants admit only so much of Paragraph 14 of the Complaint as alleges that the defendants intend to enforce Act 1205 of 1972 at statewide elections to be held in 1976 and to conduct elections for, and authorize the seating of, members of the South Carolina Senate according to the provision of Act 1205. Defendants deny the remaining allegations of Paragraph 14.

12. Defendants deny the allegations of Paragraphs 15, 16 and 17 of the Complaint.

13. All allegations of the Complaint not hereinabove expressly admitted are hereby denied.

As A Second Defense

14. Defendants reallege and incorporate in this defense, as if fully set out herein, the allegations of Paragraphs 1 through 13 above.

15. By letter of May 9, 1972, from Hardwick Stuart, Jr., Assistant Attorney General, to Assistant Attorney General, Civil Rights Division, the Defendant McLeod, as chief legal officer of the State of South Carolina submitted Act 1205 of 1972 to the United States Attorney General pursuant to 42 U. S. C. § 1973c.

16. On May 17, 1972, the United States Attorney General gave official notice that the submission of Act 1205 of

1972 had been received on May 12, 1972, and that the Attorney General had 60 days from May 12, 1972, in which to respond to the submission.

17. July 11, 1972, was the sixtieth calendar day after May 12, 1972.

18. The United States Attorney General did not, on or before July 11, 1972, interpose an objection to the enforcement of Section 2 of Act 1205 of 1972.

19. Pursuant to 42 U. S. C. § 1973c, Section 2 of Act 1205 of 1972 may be enforced by the State of South Carolina and the Defendants, because Act 1205 has been submitted to the United States Attorney General and he has not interposed an objection to Section 2 of Act 1205 within 60 days after such submission.

As A Third Defense

20. Defendants reallege and incorporate in this defense, as if fully set out herein, the allegations of Paragraphs 1 through 19 above.

21. In the case of *McCollum, et al. v. West, etc., et al.*, Civil Action No. 71-1211, Plan A of Act 1205 of 1972 was considered and approved by a three-judge panel of this Court, acting within its lawful jurisdiction, on May 23, 1972, the Court finding specifically that Plan A "complies with the requirements of the Constitution of the United States, and it is therefore approved." The *McCollum* plaintiffs claimed that multimember districts and numbered seats for the election of the South Carolina Senate had the effect of denying or abridging the right of qualified black citizens to vote on account of their race, a claim that was decided adversely to the *McCollum* plaintiffs by this Court.

22. 42 U. S. C. § 1973c neither requires nor permits the United States Attorney General to review a determination made by a United States District Court in the proper exercise of its statutory jurisdiction that a legislative reapportionment plan does not deny or abridge the right of qualified black citizens to vote on account of their race.

23. Pursuant to the determination of this Court in *McCollum v. West* that Plan A of Act 1205 complies with the requirements of the Constitution of the United States, the State of South Carolina and the Defendants may enforce Plan A of Act 1205.

WHEREFORE, having fully answered the Complaint herein, the Defendants, and each of them, pray the Court:

(1) To enter judgment declaring that the Defendants may lawfully continue to enforce Plan A of Act 1205 of 1972 and denying the Plaintiffs the relief sought in the Complaint; and

(2) To award the Defendants the costs of this action and reasonable attorneys' fees.

DANIEL R. McLEOD,
Attorney General,

TREVA G. ASHWORTH,
Assistant Attorney General,
P. O. Box 11549,
Columbia, S. C. 29211,

RANDALL T. BELL,
University of South Carolina,
Law Center,
Columbia, S. C. 29208,
Attorneys for the
Defendants.
By: /s/ DANIEL R. McLEOD

Columbia, South Carolina
November 28, 1975.

APPENDIX B

STIPULATIONS

Civil Action No. 75-1998

STIPULATIONS

The parties to the above captioned action hereby agree and stipulate as follows:

1. That on or before July 11, 1972, the only communication from the United States Attorney General to the State of South Carolina conveying a decision to object or not to object to Section 2 of Act 1205 of 1972 was a letter dated June 30, 1975, from David L. Norman, Assistant Attorney General, Civil Rights Division, United States Department of Justice to Daniel R. McLeod, Attorney General of South Carolina.

2. That on or about July 1, 1972, the State of South Carolina began implementing Plan A of Act 1205 of 1972 and that Plan A was the basis upon which primary and general elections for the South Carolina Senate were conducted in August, September and November of 1972.

3. That the State of South Carolina has continuously enforced Plan A of Act 1205 of 1972 from a date on or about July 1, 1972, until the present.

4. That the 1973, 1974 and 1975 regular sessions and the 1973 special session of the General Assembly of South Carolina and its 1976 regular session to date have all been conducted on the basis of the Senate apportionment in Plan A of Act 1205 of 1972.

5. That from July 1, 1972, until the filing of this action on November 7, 1975, neither the plaintiffs in this action nor any other citizen of South Carolina commenced any legal action seeking an injunction or other relief against the enforcement of Plan A of Act 1205 of 1972, either on the ground that the State of South Carolina had no authority to enforce Plan A under Section of the Voting Rights Act of 1965 or on any other grounds.

6. That the plaintiffs John Roy Harper II and Victoria DeLee in *Harper v. Kleindienst,* Civil Action No.

1607-72 (D. D. C. filed August 10, 1972) are the same persons as the plaintiffs John Roy Harper II and Victoria DeLee in *McCollum v. West,* Civil Action No. 71-1211 (D. S. C. filed December 7, 1971).

7. That on July 21, 1972, the plaintiffs in *McCollum v. West,* Civil Action No. 71-1211 (D. S. C. filed December 7, 1971) filed Notice of Appeal to the United States Supreme Court from the orders of May 23d, 1972, and June 9th, 1972, in that action; that on September 19, 1972, the aforesaid plaintiffs were granted an extension of time within which to docket the appeal by the United States Supreme Court; that the time within which to docket the appeal was extended to November 21, 1972, a date after the commencement of action in *Harper v. Kleindienst,* Civil Action No. 1607-72 (D. D. C. August 10, 1972); that the aforesaid plaintiffs did not perfect the appeal in *McCollum v. West.*

8. That the plaintiffs in *McCollum v. West,* Civil Action No. 71-1211 (D. S. C. filed December 7, 1971) purported to maintain a class action on behalf of, *inter alia,* black residents in Charleston County, South Carolina; that the plaintiffs in the instant action were then and are now black residents in Charleston County, South Carolina.

9. That the parties to the instant action stipulate to the introduction into the record in this action of the deposition of James H. Quackenbush, Jr., taken in the case of *Stevenson v. West,* Civil Action No. 72-45 (D. S. C. filed 1972).

10. That the South Carolina House of Representatives was reapportioned into single-member districts in 1974 following the objection of the United States Attorney General to implementation of a prior reapportionment plan contained in Act No. 836 of 1973; that on or about February 14, 1974, the United States Attorney General interposed objection to Act No. 836 of 1973; that on or about February 28, 1974, H2274, a bill reapportioning the House of Representatives into single-member districts was reported to the floor of the House by the House Judiciary Committee; that on or about March 12, 1974, H2274, as amended, passed the House of Representatives; that on or about April 10, 1974, H2274, as further amended passed the Senate; that on or about April 24, 1974, H2274, as further amended, was reported to the floors of both chambers by a joint free conference committee; that on or about April 24, 1974, the House ratified the joint free conference report; that on or about April 26, 1974, the Senate ratified the joint free conference report; that on or about April 26, 1974, H2274, as ratified, was signed into law by the Governor as Act No. 991 of 1974; that on or about April 26, 1974, Act No. 991 of 1974, was submitted to the United States Attorney General for review under Section 5 of the Voting Rights Act of 1965; that on or about June 21, 1974, the United States Attorney General notified the State of South Carolina that he would interpose no objection to Act No. 991 of 1974.

11. That on or about August 14, 1972, the State of South Carolina received notice of the order of August 11, 1972, of the United States District Court in *Harper v. Kleindienst,* Civil Action No. 1607-72 (D. D. C. filed August 10, 1972).

12. That the information contained in the first, second, third, seventh, eighth, and ninth paragraphs of an article entitled "Senate Plans Remap Suit," appearing on page one of *The State* newspaper, Columbia, South Carolina, on November 6, 1975, is substantially accurate.

13. That the parties to the instant action stipulate to the introduction into the record in this action of transcripts of the meetings of the Special Senate Reapportionment Committee held on June 3, July 29, August 11 and October 30, 1975.

/s/ ARMAND DERFNER
Attorney for Plaintiffs

/s/ RANDALL T. BELL
Attorney for Defendants

January 26, 1976.

APPENDIX C

LETTER OF JUNE 30, 1972, FROM DAVID L. NORMAN TO DANIEL R. McLEOD

June 30, 1972

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear General McLeod:

This is in reference to your submission of Acts 1204 and 1205 to the Attorney General pursuant to the provisions of Section 5 of the Voting Rights Act of 1965. Act 1205 provides for a new reapportionment plan for the State Senate and extends the numbered post requirement to all multi-member districts in the House of Representatives. Act 1204 provides for the use of numbered posts in all multi-member bodies in the state. Because some of the provisions are similar and you have sought expedited consideration of both submissions to meet election schedules, this letter deals with both statutes.

Senate Plan

Act 1205 was adopted on May 5, 1972 after the three-judge district court in *Twiggs, et al. v. West, et al.* (D. C., S. C., Nos. 71-1106, 71-1123, 71-1211) ruled that a prior senate reapportionment (Act 932) deviated from the one-man, one-vote principle and contained an impermissible residency requirement. In one of the cases consolidated in that proceeding, plaintiffs also invoked the court's jurisdiction under the Fifteenth Amendment, claiming that multi-member senate districts and the numbered seat requirement illegally diluted minority voting strength. In its opinion of April 7, 1972, the court considered and rejected these contentions. As you are also aware, on March 6, 1972, prior to the above opinion, we entered an objection to Act 932 which you had submitted under Section 5 of the Voting

Rights Act. The view expressed in our letter was that under existing precedents we were unable to conclude that the combination of multi-member districts, numbered posts and majority run-off would not dilute and abridge the voting strength of racial minorities. Senate reapportionment Plan A of Act 1205 was considered and approved by the three-judge court on May 23, 1972 with the court finding specifically that Plan A "complies with the requirements of the Constitution of the United States, and it is therefore approved."

Our only function under Section 5 of the Voting Rights Act is to review submitted acts for Fifteenth Amendment compliance as nearly as possible in the same manner that the District Court for the District of Columbia would had the act been presented there as the subject of a declaratory judgment action. Under this standard, we feel constrained to defer to the above determination of the three-judge District Court. The District Court unquestionably had jurisdiction to consider the issues presented to it under both the Fourteenth and Fifteenth Amendments, and it has specifically found Plan A to be constitutional. Parties who feel aggrieved by its decision have full right to seek appellate review. It would in our view not be appropriate to read the Voting Rights Act as requiring or permitting the Attorney General to review a determination made by a United States District Court in the proper exercise of its statutory jurisdiction. For this reason, we enter no objection to the implementation of Plan A of Act 1205.

Numbered Seats

Section 3 of Act 1205 and Act 1204 extend the requirement of running for numbered posts to all multi-member boards, commissions and other elective offices in the state, including the House of Representatives. In *Johnson v. West* (No. 72-680), the same three-judge court was requested to enjoin implementation of these acts until they had been submitted under Section 5 of the Voting Rights Act. On June 14, 1972, the court entered such an order and specifically found that these provisions had never been ruled upon by the court. Unlike the situation with respect

to the Senate reapportionment plan, we review these acts without any prior judicial determination of constitutional validity or invalidity and with the burden of proof being on the submitting authority to show that the acts do not have the proscribed racial effect.

We have previously reviewed with you the various legal precedents indicating that the use of numbered seats and majority run-off requirements in multi-member electoral jurisdictions may impermissibly dilute the voting strength of cognizable racial minorities. (See our letter of March 6, 1972.) The question is whether we can certify that South Carolina's extension of the numbered seat requirement to virtually every multi-member office in the state does not have the dilutive effect described in those authorities.

According to information you furnished in connection with this submission, in addition to the House of Representatives, these requirements would apply to most of the state's school boards, county councils and municipal governing bodies. Many of these electorates contain cognizable racial minorities and we are unable to conclude that the racially dilutive effect some courts have described would not be occasioned by the numbered seat requirement.

For the above reasons, we must enter an objection on behalf of the Attorney General to the implementation of Act 1204 and Section 3 of Act 1205. As the Voting Rights Act provides, you may seek approval of these statutes in the District Court for the District of Columbia notwithstanding this objection.

Sincerely,

/s/ DAVID L. NORMAN,
Assistant Attorney General,
Civil Rights Division.

APPENDIX D

LETTER OF JULY 20, 1973 FROM J. STANLEY POTTINGER TO DANIEL R. McLEOD

July 20, 1973

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear Mr. Attorney General:

This is in reference to Act No. 1205 reapportioning the South Carolina Senate districts which was originally submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, on May 9, 1972.

On June 30, 1972 we notified you that no objection would be interposed to the senate redistricting because the Attorney General was "constrained to defer" to a determination made on May 23, 1972 by the three-judge court in *Twiggs, et al. v. West, et al.* (D. S. C. Nos. 71-1106, 71-1123, 71-1211). The Attorney General's decision not to object was subsequently challenged in the District Court for the District of Columbia, *Harper, et al. v. Richardson, et al.* (C. A. No. 1607-72). On August 11, 1972 the District Court entered an order suspending the 60-day period within which the Attorney General may enter an objection to changes submitted to him pursuant to Section 5. On May 16, 1973 the Court ordered the matter "remanded to the Attorney General of the United States for a reasoned decision in accordance with his statutory responsibilities" and required him to report to the Court within 60 days. Notice of appeal to the Court of Appeals for the District of Columbia was filed. Stay applications were denied in the District Court on June 11, 1973 and in the Circuit Court on July 13, 1973.

On July 16, 1973, in response to the Court's order, the Attorney General filed a decision based on a reconsideration of Act No. 1205, again deferring to the decision of

the three-judge court in the *Twiggs* case. This opinion indicated that but for the decision in *Twiggs*, the Attorney General would have objected to the Senate plan. On July 19, the District Court ordered the Attorney General to consider the Senate plan "without regard to the decision of the Three Judge District Court in *Twiggs v. West*." Copies of the orders of the District Court and the Attorney General's decision of July 16, 1973 are enclosed for your information.

Pursuant to the Order of July 19, 1973 and for the reasons set forth in the Attorney General's decision of July 16, 1973 and in our March 6, 1972 letter objecting to Act 932, an earlier Senate plan, I am unable to conclude that Act No. 1205 does not have the effect of abridging voting rights on account of race. Therefore, on behalf of the Attorney General, I must interpose an objection to the implementation of the election procedure set forth in that statute.

Of course, as provided for by Section 5, you may institute an action in the District Court for the District of Columbia for a declaratory judgment that Act 1205 does not have the purpose and will not have the effect of abridging the right to vote on account of race, notwithstanding this objection.

Sincerely,

/s/ J. STANLEY POTTINGER,
Assistant Attorney General,
Civil Rights Division.

APPENDIX E

ORDER OF AUGUST 11, 1972, IN HARPER v. KLEINDIENST, CIV. A. NO. 1607-72 (D. D. C. 1972)

Civil Action No. 1607-72

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This cause came on to be heard upon the complaint, the plaintiffs' Motion for Interim Relief and Memorandum in support thereof, the amendment to such motion made by plaintiffs in open court, and oral arguments of counsel. Upon consideration thereof, the Court being advised in the premises, the Court makes the following findings and conclusions.

FINDINGS

1. By letter dated June 30, 1972, the Attorney General of the United States notified the State of South Carolina that no objection would be interposed with respect to Sections 1 and 2 of Act 1205 of the State of South Carolina.

2. The time within which the Attorney General may interpose an objection to such sections under Section 5 of the Voting Rights Act, 42 U. S. C. § 1973c has not expired.

CONCLUSIONS

1. The Court has jurisdiction over the subject matter of this action and the parties thereto.

2. Unless appropriate steps are taken to maintain, *pendente lite*, the authority under Section 5 of the Voting Rights Act of defendant Attorney General of the United States to object to Sections 1 and 2 of Act 1205: (1) the jurisdiction of this Court to order final relief and (2) the rights of the plaintiffs to exercise their right to vote as citizens and voters in South Carolina free from acts or practices which the State has failed to prove do not have the purpose or effect of denying or abridging rights to vote on account of race or color, may be impaired, and such impairment would constitute an irreparable injury to the plaintiffs.

3. No injury will be caused if the following interim relief is granted, *pendente lite.*

WHEREUPON, it is by the Court, this 11th day of August 1972,

ORDERED

1. Pursuant to 5 U. S. C. § 705, the time within the Attorney General may interpose an objection to Act 1205 of the State of South Carolina is hereby extended pending further order of Court, or a further decision by the Attorney General as to whether South Carolina Act 1205 does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, giving reasons therefor, and submission of such decision to this Court.

2. The defendants are directed to notify the State of South Carolina of the entry of this order.

3. Jurisdiction of this case is retained by this Court.

4. This order does not preclude the defendants from litigating any issue in these proceedings in due course.

/s/ JUNE L. GREEN,
U. S. District Judge.